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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/695,038	10/28/2003	Michael James Justin	01052	5708

35467 7590 11/23/2007  
BIOMERIEUX, INC.  
PATENT DEPARTMENT  
100 RODOLPHE STREET  
DURHAM, NC 27712

EXAMINER
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NAGPAUL, JYOTI

ART UNIT	PAPER NUMBER
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1797

MAIL DATE	DELIVERY MODE
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11/23/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/695,038

Applicant(s)

JUSTIN ET AL.

Examiner

Jyoti Nagpaul

Art Unit

1743

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 13 September 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2 and 4-12 is/are rejected.
- 7) ☒ Claim(s) 3 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

Amendment filed on September 13, 2007 has been acknowledged. Claims 1-12 are pending.

#### ***Response to Amendment***

Rejection of Claim 3 as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention has been withdrawn in light of applicants' amendments.

Rejection of Claims 1-3 and 8 are as being anticipated by Maes (EP 0 896224) has been withdrawn in light of amendments.

Rejection of Claims 4-5 are as being unpatentable over Maes (EP 0 896224) in view of Clark has been withdrawn in light of amendments.

Rejection of Claims 6-7 as being unpatentable over Maes in view of Stevens (US 4582990) has been withdrawn in light of amendments.

Rejection of Claims 9 and 10 as being unpatentable over Maes in view of Clark has been withdrawn in light of amendments.

Rejection of Claims 11 and 12 as being unpatentable over Maes in view of Clark as applied to claim 9 above, and further in view of Stevens (US 4582990) has been withdrawn in light of amendments.

#### ***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. **Claims 1-2 and 8-10** are rejected under 35 U.S.C. 103(a) as being unpatentable over Fanning (EP 802413) in view of Maes (EP 896224).

Fanning teaches an automatic sample testing machine for testing samples stored in test cards. The machine comprising a carrier/cassette (26) having N receiving structures (61) for receiving N test sample devices/same cards (28) and N vessel receiving structures (62) for receiving N vessels/test tubes containing a fluid test

sample. Additionally, the N is an integer greater than one and each receiving structure is for receiving a test sample device. (See Figure 7) Fanning further teaches the test sample devices comprise multi-well test sample cards (28). (See Figure 3) According to Figure 7, Fanning teaches a body having an upper portion and a lower portion and first and second side portions. Fanning further teaches the carrier (26) is moved through the in the instrument in a direction along a path of movement having a longitudinal axis. (See Figure 1, see positioning system 100) Furthermore, the test sample devices (28) are oriented in the carrier (26) in a direction orthogonal to the longitudinal axis. (See Figure 1)

Fanning fails to teach N optical interrupt positioning features that are arranged on the carrier in a direction parallel to the direction of movement of the carrier in the instrument. Each of the positioning features/tabs is placed in registry with one of the receiving structures. Furthermore, the detection of one of the positioning features is by a fixed optical interrupt sensor in the sample testing instrument and further detects a position of a test sample device placed in the receiving structure corresponding to the positioning feature.

Maes discloses an analytical instrument for conducting biological sample testing. The instrument comprises a carrier/carousel segment (670) for movement of test sample devices/test sample cards. The carrier comprises N optical interrupt positioning features/tabs (691) that is formed in the carrier (670). Additionally, each of the positioning features/tabs (691) is placed in registry with one of the receiving structures/slots (614). Furthermore, the detection of one of the positioning features/tabs

(691) is by a fixed optical interrupt sensor (693) in the sample testing instrument (100) and further detects a position of a test sample device/card placed in the receiving structure/slot (614) corresponding the positioning feature/tab (691). (See Col. 16, Lines 33-46)

It would have been obvious to one having ordinary skill in the art to provide the carrier of Fanning with N optical interrupt positioning features that is formed in the carrier where each of the positioning features/tabs is placed in registry with one of the receiving structures and a fixed optical interrupt sensor in the sample testing instrument as disclosed by Maes to achieve the predictable results of correctly positioning a test sample card in the receiving structure of the carrier.

5. **Claims 4-5** are rejected under 35 U.S.C. 103(a) as being unpatentable over Fanning (EP 802413) in view of Maes (EP 896224) as applied to claim 1 above, and further in view of Clark.

Refer above for the teachings of Fanning and Maes.

Fanning and Maes fail to teach the carrier further comprises a first portion having a handle and opposite second portion having a flat panel. The flat panel having a bar code associated with the carrier/carousel segment.

Clark teaches an analytical instrument for chemical, immunochemical and biological testing of samples. Clark teaches a carrier/carousel segment (626) comprises a first portion having a handle (601) and opposite second portion having a flat panel (624) for receiving a bar code associated with the carrier/carousel segment.

It would have been obvious to a person of ordinary skill in the art to modify the device of Fanning in view of Maes to provide a first portion having a handle to achieve the predictable results of further assisting the operator for easy removal and insertion of the carrier into and out of the instrument as disclosed in Clark.

Bar codes are conventionally known in the art. Thus, it would have been obvious to a person of ordinary skill in the art to modify the device of Fanning in view of Maes to provide an opposite second portion having a flat panel for receiving a bar code associated with the carrier to achieve the predictable results of assisting the operator in easily identifying the samples in the carrier as disclosed in Clark.

6. **Claims 6-7 and 11-12** are rejected under 35 U.S.C. 103(a) as being unpatentable over Fanning (EP 802413) in view of Maes (EP 896224) as applied to claims 1 and 9 above, and further in view of Stevens (US 4582990).

Refer above for the teachings of Fanning and Maes.

Fanning and Maes fail to teach the carrier further comprises alphanumerical indicia for the receiving structures and the alphanumerical indicia numerals provided on the carrier 1 to N in registry with the receiving structures.

Stevens teaches a test tube tray/carrier comprising alphanumerical indicia (205) provided on the carrier 1 to N with the receiving structures. (See Figure 7)

It would have been obvious to a person of ordinary skill in the art to modify the device of Maes to provide alphanumerical indicia numerals provided on the carrier 1 to N in registry with the receiving structures to achieve the predictable results of assisting the operator with identifying the proper location of the test samples in the slots.

***Allowable Subject Matter***

7. **Claim 3** is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Prior art fails to teach or fairly suggest positioning features comprise voids formed in a rib projecting from a lower surface and the rib is placed between the first and second side regions. Also, the fixed optical interrupt sensor is positioned in the instrument along the path of movement of the carrier where the rib passes over the optical interrupt sensor.

***Response to Arguments***

8. Applicant's arguments with respect to claims 1-12 have been considered but are moot in view of the new ground(s) of rejection. Refer above.

***Conclusion***

9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of




the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Nagpaul whose telephone number is 571-272-1273. The examiner can normally be reached on Monday thru Friday (8:00-4:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill Warden can be reached on 571-272-1267. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JN  
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